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In the Supreme Court of the United States

OCTOBER TERM, 1948

NOS. 299–304

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION

UNITED STATES OF AMERICA, PETITIONER

v.

J. SHELDON POTTER

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN ERRECA

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES J. STEVINSON, A CORPORATION

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, PETITIONER

v.

3–H SECURITIES COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments entered in these cases on March 1, 1948, and April 5, 1948, by the United States Court of Claims.

OPINIONS BELOW

The opinion of the Court of Claims overruling a demurrer in *Gerlach Live Stock Company* v. *United States* is reported in 102 C. Cls. 392. Its opinions after trial (R. 130–146, 191–192) are reported in 76 F. Supp. 87, 99.

JURISDICTION

The judgments of the Court of Claims in the Gerlach, J. Sheldon Potter, and Martin Erreca cases were entered on April 5, 1948 (R. 146–147).[1] A motion for new trial was denied June 28, 1948 (R. 147). Judgments were entered in the James J. Stevinson (a Corporation), Archibald Stevenson and 3–H Securities Company cases on March 1, 1948 (R. 192). A motion for new trial was denied June 1, 1948 (R. 192). On August 20, 1948, the time within which to file a petition for writs of certiorari in the Stevinson and 3–H Securities Company cases was extended by Mr. Justice Jackson to and including September 28, 1948 (R. 193). Jurisdiction of this Court is invoked under 28 U. S. C. 1255.

[1] These judgments were in substitution for judgments originally entered March 1, 1948, which were withdrawn.

QUESTION PRESENTED

1. Whether the Court of Claims was warranted in holding, contrary to an express Congressional declaration, that the construction of the Friant Dam, as an integral part of the Central Valley Project in California, was not authorized for the purpose of aiding navigation and commerce.

2. Whether owners of riparian land have a property right in the flow of a navigable river, particularly in flood waters and flood stages.

3. Whether the judgments of the Court of Claims are deficient for failure of the court to make a finding describing the property which the court concluded was taken from respondents.

4. Whether the Court of Claims was correct in holding that there was a taking of respondents' water rights by October 20, 1941, and that just compensation must include interest from that date, even though at the time of trial nearly five years later, respondents had not been deprived of benefits from the flow of the river which they had formerly received and could not have been so deprived because various portions of the project had not been completed.[2]

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[2] In the event that this petition for writs of certiorari is granted, additional questions will be presented whether the Court of Claims correctly construed Article XIV, section 3, of the California Constitution (Fdg. 48, R. 102–103; see R. 138–140) and whether the court was correct in holding that the exceptions in the deeds of respondents Gerlach Live Stock Company (Fdg. 39, R. 125), J. Sheldon Potter (Fdg. 51, R. 106), and Martin Erreca (Fdg. 59, R. 111) did not prevent their recovery (R. 134–138).

STATUTES INVOLVED

Section 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, provides:

> SEC. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided,* That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, pro-

viding for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and third, for power.

* * * * *

The relevant portion of the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, provides:

> The second proviso in section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: "*Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings, and in order to permit the full utilization of

the works constructed to accomplish the aforesaid purposes."

STATEMENT

These six cases were brought to recover just compensation for the alleged taking of property as a result of erection of the Friant Dam on the San Joaquin River, California. After a demurrer was overruled in *Gerlach Live Stock Company* v. *United States*, 102 C. Cls. 392, all the cases were consolidated by order of the court and were tried together. Two sets of findings of fact and conclusions of law were made: one applicable to the *Gerlach, Potter* and *Erreca* cases and another applicable to the two *Stevinson* and the *3–H Securities Company* cases. The issues raised and the conclusions thereon were, however, all discussed in the opinion in the *Gerlach*, etc., cases which was adopted as the opinion in the *Stevinson*, etc., cases. The facts, as found by the Court of Claims, may be very briefly summarized as follows:[3]

The Central Valley of California embraces the area drained by the Sacramento and San Joaquin Rivers, both of which meet in a common delta and empty into Suisan Bay, an arm of San Francisco Bay (Fdg. 1, R. 71). Both the Sacramento and the San Joaquin Rivers are navigable rivers

[3] Since there is little difference between the findings in the two groups of cases, references herein will be to the findings in the *Gerlach*, etc., cases.

of the United States. The present controversy relates to the right to use waters of the San Joaquin. That river has its source in the Sierra Nevada Mountains and flows westerly to Friant where it enters the valley (Fdgs. 2, 49, R. 71, 103–104). From this point, where the Government's dam is situated, it continues west some 40 miles to Mendota, where it is joined by Fresno Slough of the Kings River (Fdg. 2, R. 71). At this point the river abruptly turns north and flows 225 miles to the bay. Respondents' lands are situated in the valley north of Mendota.

In its course through the mountains the river banks are high but after it reaches Gravelly Ford, some 27 miles west of Friant, the banks are low and are overflowed in periods of high water. In the vicinity of respondents' lands the river has numerous side channels and sloughs (Fdg. 3. R. 71–72). At lowest stages the flow of the river is confined by natural banks (referred to in the findings as the "low channel"), and at higher stages is similarly confined by other banks (referred to in the findings as the "high channel") Fdg. 4, R. 72). Every year the river overflows the higher banks for a few days in each of two annual periods, from December to February and from April to June (referred to in the findings as the "overflow channel") (Fdg. 4, R. 72). The lands are moistened and enriched by such overflow (Fdgs. 3, 4, R. 71–72). Respondents own both land between the two banks and land outside of the

banks (Fdgs. 6–8, R. 73–74). These are the lands involved in these cases.

Miller & Lux, Incorporated, and its subsidiaries own large areas of land in the vicinity, and formerly owned those of respondents Gerlach, Potter, and Erreca. Upstream from respondents' lands, it has diverted and appropriated water in the river to irrigate lands owned by it and by other persons (Fdgs. 9–10, R. 74–75). A dam, known as "Sack Dam," which is located at Temple Slough some 19 miles downstream from Mendota, is annually rebuilt to irrigate land west of the river and is maintained until October or November or December (Fdg. 13, R. 76–77). Respondents recognized that various rights, including those of Miller & Lux, were entitled to be satisfied out of the waters of the river before respondents were entitled to any water (Fdgs. 12, 14, R. 76–77). Satisfaction of such prior rights "requires the entire supply of water in the river at certain times of the year, and at all times of the year in some years of exceptionally low water" (Fdg. 12, R. 76). While Sack Dam is in place, "plaintiffs do not receive and are not entitled to receive any material amount of water from the river" (Fdg. 13, R. 76).

The Central Valley project, whose principal features are the Shasta Dam on the Sacramento River, the Friant Dam on the San Joaquin River and a number of canals for the control and distribution of water, was first undertaken by the State of California. By the Act of August 30,

1935, 49 Stat. 1028, 1038, Congress appropriated $12,000,000 toward the construction of the Kennett (Shasta) Dam. In December of that year the President approved a plan for the project as set forth in a letter of the Secretary of the Interior as a Federal undertaking (Fdg. 32, R. 90). The project was reauthorized by Congress in 1937 and 1940 and large sums have been appropriated for its construction (Fdg. 36, R. 95). Execution of the plan has proceeded with certain modifications, and in November 1939 construction was commenced on the Friant Dam, which will impound water of the San Joaquin River (Fdgs. 36, 42, R. 95, 99). In October 1941 the dam was used to impound water by closing temporary outlets, the water level having been previously raised some 10 feet when the temporary openings were in use (Fdg. 43, R. 100). However, necessary valves were not installed until 1943, drum gates were not installed at the time of trial, and the diversion canals were not completed at that time (Fdgs. 44–46, R. 100–102). Thus, up to the time of the trial respondents were still receiving "all the water they ever got" (R. 141).

The United States purchased certain rights from Miller & Lux, the agreement providing for an escrow fund to pay judgments that might be recovered against the United States under certain conditions (Fdgs. 37, 38, R. 95–97). Respondents Gerlach Live Stock Company, Potter and Erreca claimed their lands through conveyances from

Miller & Lux in which that company had reserved certain rights (Fdgs. 51, 59, 79, R. 106–107, 111–112, 125–126). The court found that the lands of respondents benefited only from overflow, and in one case from seepage, as a result of spring floods of the San Joaquin River and that such benefits will be lost when the Friant Dam and the diversion canals are placed in operation (Fdgs. 56, 62, 85–87, R. 110, 113, 127–128). The court further found that except in a year of extremely high water respondents' lands would not be flooded by water from other sources combined with spills from the Friant Dam (Fdg. 47, R. 102).

In the *Gerlach* case the Government had demurred to the petition on the ground that, since Congress had declared that the Central Valley project was for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof and other purposes and had directed that "the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control," the prevention of the flooding of respondents' land did not constitute a taking. The court overruled this demurrer on the ground that there was nothing to negative plaintiffs' allegation that the purpose of the construction of Friant Dam was solely to irrigate certain nonriparian lands.[4] *Gerlach Live Stock*

[4] The petition (R. 1–9) contained no such allegation.

Company v. *United States*, 102 C. Cls. 392. After the trial, the court found (Fdg. 49, R. 103–104):

> The San Joaquin River is a navigable stream. Apart from the plan set forth in findings 32–36, inclusive, no evidence has been introduced proving or attempting to prove the effect of the completion and operation of Friant Dam and the diversion canals on the navigability of the San Joaquin River, except the evidence which shows that when the project comes into full operation, substantially all the flow of the river will be stopped at Temple Slough for 36 out of 48 years. During the other 12 years the flow will be reduced to a small percentage of the flow which would have occurred in the absence of such dam and diversion works. No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods.
>
> There is no dispute that the operation of the dam at Shasta will aid navigation of the Sacramento River.

Upon these findings, judgments were entered for the respondents. The opinion of the court concluded first, that the Friant Dam was erected for the "sole and only purpose of irrigating arid and semiarid lands, and perhaps also flood control" (R. 130), and that the purpose of this flood control "was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands" (R. 131). Next, it concluded that respondents were entitled to compensation for the loss of benefits from flood waters (R. 133). The court then concluded that respondents Gerlach Live Stock Company, Erreca and Potter were not barred from recovery because of the exceptions in their deeds (R. 134–138), nor were respondents' rights to recovery affected by Article XIV, sec. 3, of the California Constitution (R. 138–141). It further held that there had been a taking by October 20, 1941 (R. 141–145), and interest from that date was added to the amount awarded each respondent.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In holding that there had been a taking of property of respondents.

2. In failing to give effect to the declaration and directions of Congress as to the purposes of the Central Valley project.

3. In holding that the Friant Dam was erected

solely for the purpose of irrigating arid and semi-arid lands.

4. In holding that respondents had property rights in the flow of a navigable river as against the United States.

5. In failing to define what property interests were taken.

6. In holding that there had been a taking on October 20, 1941, and in including interest from that date as a part of just compensation.

7. In holding that respondents Gerlach Live Stock Company, J. Sheldon Potter and Martin Erreca were not barred from recovery by the reservation of water rights by their predecessor in title.

8. In holding that respondents' rights to recover were not affected by Article XIV, sec. 3, of the Constitution of the State of California.

9. In entering judgments against the United States.

REASONS FOR GRANTING THE WRIT

1. In 1937 and 1940, Congress declared that one of the purposes of the Central Valley Project was the improvement of navigation and commerce and directed that the project should be used, first, for such purposes. "It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That de-

termination is legislative in character." *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527–528. Cf. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66. In *Arizona* v. *California*, 283 U. S. 423, with reference to a similar statute, it was stated (pp. 456–457), "This Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose." The fact that purposes other than navigation and commerce will be served does not change the result. *Arizona* v. *California*, 283 U. S. 423, 456. Nevertheless the court here undertook to review and reject the declarations and directions of Congress.

The Court of Claims apparently took the view that the federal power to improve navigation or commerce can only be exercised by increasing the facilities for the operation of boats in the immediate vicinity of the dam. It said (R. 130): "Instead of improving navigation on the San Joaquin River the erection of this dam destroyed any possibility of navigation on the upper reaches of the river." But the federal authority is not so limited. As this Court said in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426: "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than opera-

tion of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." And validity of the exercise of the power is not to be tested simply by reference to one reach of the river as it was by the court below. Congress may destroy navigation in one part of a river to improve or preserve navigation and commerce elsewhere. *United States* v. *Commodore Park*, 324 U. S. 386; *South Carolina* v. *Georgia*, 93 U. S. 4. The decision below was based on fundamental error in ignoring these principles. This is clear from the court's own finding that there was no evidence as to the effect of Friant Dam upon navigation or commerce in other reaches of the river. That finding (Fdg. 49, R. 103–104) demonstrates that there is no evidence which would justify a conclusion that the Congressional declarations and directions are impossible of execution and may therefore be ignored.

The statement in the opinion below that the purpose of flood control, for which Friant Dam will be operated, "was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands" (R. 131) is thus neither based upon findings nor evidence. Indeed

it is contradicted by the findings that in operation there will be spills to provide reserve storage capacity for the purpose of flood control (Fdg. 32, R. 90) and that (Fdg. 35, R. 94): "Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control." Moreover, because of the benefits which Friant Dam will contribute in controlling floods, the district engineer in 1944 stated that part of the cost of Friant Dam might be charged to flood control. H. Com. on Flood Control Doc. No. 2, 78th Cong. 2d sess.

In its ruling upon demurrer, the Court of Claims reasoned that, while Congress had declared that the entire Central Valley project was for the purpose of improving navigation, among other things, "we do not understand Congress to have meant the entire project and each integral part thereof." *Gerlach Live Stock Company* v. *United States,* 102 C. Cls. 392, 399. The court concluded that, looking at Fraint Dam alone, it is impossible to say that the dam was intended to improve navigation and "we do not think Congress meant to say it was." The same view was adhered to upon the final decision (R. 131). Thus, the conclusion below rested upon the view that the particular activity in a navigable river wich produces the damage complained of must directly improve navigation, and that in determining whether

the authority of the Federal Government over navigable waters is being exercised the fact that the particular structure constitutes simply one element of a comprehensive plan must be ignored. This is precisely the contention that was made in *United States* v. *Commodore Park,* 324 U. S. 386, where the circuit court of appeals held that the deposit of dredged material in a navigable creek was not related to commerce or navigation although the dredging of it was. This Court reversed, stating (p. 392):

> That there were two bodies of navigable waters to which the one program related, does not detract from Congressional power as to either, for its powers are broad enough to justify one unified program for the connected body of waters to the end that commerce in general may be fostered.

See also *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, 525, 527–528; *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546, 551–554.

So here, the Friant Dam was not an isolated project but was an integral part of the entire Central Valley project. It is clear that Congress treated the project as a whole, and the Friant Dam may not be excluded from the declarations of purpose and the directions as to operation of the project.

The Central Valley Project was first undertaken by the State of California in 1933, the Act declaring that it was a single project and, as to

Friant Dam specifically, that it was for "improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River" and other purposes. Cal. Water Code, secs. 11200, 11226. The project was subsequently taken over by Congress, and has since been carried on by the Federal Government.[5] An essential feature of the project from the beginning has been that excess water from the Sacramento River will be transferred to the San Joaquin basin, permitting better use of waters, especially flood waters, in the San Joaquin Valley. It is this transfer of waters stored at Shasta on the Sacramento to the San Joaquin Valley which will permit water at Friant to be stored so as to avoid floods

[5] In 1933, the Chief of Engineers submitted to Congress a report on "the comprehensive plan presented by the State authorities" (H. Doc. No. 191, 73d Cong., 2d sess; Rivers and Harbors Com. Doc. No. 3, 73d Cong., 2d sess.), and pursuant to his recommendation, Congress authorized a contribution of $12,000,000 to the project. Act of August 30, 1935; 49 Stat. 1028, 1038. See *United States* v. *Miller*, 317 U. S. 369, 370–371. The project was discussed at length in a comprehensive report in 1934 upon rivers throughout the country. H. Doc. No. 395, 73d Cong., 2d sess., pp. 322–332, 379–380. In December 1935, upon the recommendation of the Secretary of the Interior, the President approved the project as a federal undertaking (Fdg. 33, (R. 91–93). The "entire Central Valley Project" was reauthorized by Congress in the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, and the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200. Large sums have been appropriated for the project and the progress on its execution has been regularly reported to Congress. Fdg. 36, R. 95, Annual Reports, Sec'y of the Interior.

in the Valley and to be diverted to irrigation purposes. The Friant Dam is thus clearly to be "viewed not in isolation but as part of a comprehensive, integrated * * * system," *Oklahoma v. Atkinson Co.*, 313 U. S. at 527, for the multiple purposes of navigation improvement, flood control, and irrigation.*

The declarations of Congress in 1937 and 1940 were advisedly directed to "the entire Central Valley project, California," and its statement of purpose that the project was for "improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of stored waters thereof" embraced all the elements of the project. For these reasons, the conclusion that "the purpose of the construction of this dam was to irrigate certain nonriparian lands, and not in aid of navigation" (R. 131), is believed to be erroneous. The issue is important in the prosecution of works for the improvement of river basins in the combined interests of all parties

* The method of transfer of these waters has been altered in that rather than using dams and pumping plants in the San Joaquin River, the transfer will be accomplished by gravity flow in the Delta-Mendota Canal (Fdg. 33, 34, R. 91-94). This modification does not change the essential purpose of the project, nor does it alter the fact that the exchange of water from the Sacramento to the San Joaquin River is a basic element of the comprehensive plan. See S. Doc. No. 142, 79th Cong., 2d sess., p. 23; H. Doc. No. 649, 78th Cong., 2d sess., pp. 28, 47.

concerned. And this is the first time that a congressional declaration that a project is for the purpose of improving navigation and commerce has been held for naught by a court.

2. Respondents are not complaining that a Government project is flooding their lands (cf. *United States* v. *Dickinson*, 331 U. S. 745); they are insisting that they have a right to be flooded with which the Government cannot interfere under its power over navigable streams. In the state of nature, the San Joaquin River annually overflowed above its natural channel, flooding riparian lands and thereby moistening and enriching them and promoting the growth of vegetation for pasturage. The result of operation of Friant Dam and the diversion canals will be to deprive the lands of this benefit. Compensation was awarded for this deprivation (Fdgs. 56, 57, 85, R. 110, 127), and in one case for the loss of subirrigation by seepage from the main channel (Fdg. 62, R. 113).

Thus, the result of the decision below is a holding that respondents have a right to the natural overflow of a navigable stream—that is, to floodwater. But this Court has several times held that, as against the United States, riparian landowners do not have a property right in the continued flow of a navigable stream for which they are entitled to compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69; *United States* v. *Willow River Co.*, 324 U. S. 499, 507–

508. In *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, this Court stated:

> The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

The fact that as between private individuals, riparian rights in the waters of navigable rivers are recognized is not controlling. As this Court said in *United States* v. *Willow River Co.*, 324 U. S. 499, 510:

> Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

3. In *United States* v. *Causby*, 328 U. S. 256, 267, this Court held that the Court of Claims is under a duty to make a finding accurately describing the property interest taken. No such finding was made in the instant case. The findings recognize that respondents' rights to use the water are

inferior to other rights. In view of the nature of water rights and considering the character of the Central Valley project, which will involve further development in the future, it is especially important that the interest vested in the United States as a result of these proceedings be precisely described.

4. By October 20, 1941, Friant Dam was sufficiently complete so as to impound water and this was done to a minor extent by November 11, 1941. However, the necessary valves were not available until 1943 and the drum gates had not been installed at the time of trial (Fdgs. 45, 46, R. 101–102). The Madera Canal through which part of the water will be diverted was completed in 1944, and the Friant-Kern Canal was not completed at the time of trial (Fdgs. 34, 46, 56, 94, 101, 110). As the opinion of the court stated, "It is true that plaintiffs are still getting all the water they ever got because defendants' project has not yet advanced to the stage where their water has been cut off" (R. 141, see Fdgs. 56, 75, 85, R. 110, 124, 127).

Nevertheless, the Court of Claims held that a taking had occurred by October 20, 1941 (R. 141–145), and interest which, at the present time, would amount to approximately $26,320.00 was awarded from that date.

In the instant case, it was physically impossible in October 1941 to deprive respondents of waters since the valves and gates had not been installed nor had the diversion canals been completed.

Indeed, at that time, even the year in which respondents' property would first be affected could not be foretold. The situation would seem to be comparable to that in *Danforth* v. *United States,* 308 U. S. 271, where this Court held that there was no taking and hence interest was not paid when the setback levee had been completed but the river bank levee at the fuse plug had not been lowered from its previous height. In the *Danforth* case, the lands had not been subjected to any burden, actually experienced, of caring for greater floods. Here, the converse is true. Subsequent to October 1941, respondents' lands still received all the water they ever got. To require the payment of interest under such circumstances would seem to be "unjust to the public." *Bauman* v. *Ross,* 167 U. S. 548, 574. The cases cited by the Court of Claims (*United States* v. *Dickinson,* 331 U. S. 745; *Hurley* v. *Kincaid,* 285 U. S. 95; *United States* v. *Sponenbarger,* 308 U. S. 256, and *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U. S. 327) dealt with different factual situations and were not concerned with the problem of interest; the *Danforth* case would seem to state the correct principle and to be most closely in point.

5. The issues herein presented are important in the execution of similar governmental projects, and there is probable conflict with decisions of this Court on each of the points we have discussed. Moreover, there are now pendir[illegible] in the

Court of Claims twenty-seven cases in which the plaintiffs seek to recover compensation in the total amount of $1,936,504.44 because of construction of the Friant Dam. Eleven similar cases involving claims for $101,300.00 are pending in the United States District Court for the Southern District of California. In addition, seven injunction cases are pending; two in the United States District Court for the District of Columbia; four in the United States District Court for the Southern District of California, and one in the Superior Court, Fresno County, California. A review of the instant cases will authoritatively determine the principles which will control all of the pending cases.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for writs of certiorari should be granted.

Respectfully.

PHILIP B. PERLMAN,
Solicitor General.

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